

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
SPECIAL CIVIL APPLICATION No. 20047 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE H.K.RATHOD

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1 Whether Reporters of Local Papers may be allowed
to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy
of the judgment ?

4 Whether this case involves a substantial question
of law as to the interpretation of the
constitution of India, 1950 or any order made
thereunder ?

5 Whether it is to be circulated to the civil judge
?

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SOMABHAI A. DARJI - Petitioner(s)
Versus
STATE OF GUJARAT & 3 - Respondent(s)

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Appearance :

MR PRAKASH K JANI for Petitioner(s) : 1,
MR LB DABHI, A.G.P. for Respondent(s) : 1,
NOTICE SERVED for Respondent(s) : 2 - 3.
MR DHIRENDRA MEHTA for Respondent(s) : 4,

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CORAM : HONOURABLE MR.JUSTICE H.K.RATHOD

Date : 11/09/2006

ORAL JUDGMENT

1. Heard the learned advocate Mr. P.K. Jani appearing on behalf of the petitioner and learned A.G.P. Mr. Dabhi appearing on behalf of respondent No.1.

2. In the present petition, looking to the prayers

made by petitioner in Para 32 which is quoted as under :

"32(A) : The Hon'ble Court may be pleased to issue a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or direction, directing respondent No.2 to comply with the order dated 14.8.2002, which is at Annexure 'V' to the petition; and be further pleased to release appropriate amount of salary in the account of the petitioner in view of the said order and grant all consequential benefits to the petitioner from 27.6.1996 till the entitlement of the petitioner.

32(B) : Pending hearing and final disposal of the writ petition, this Hon'ble Court may be pleased to direct respondent No.2 to comply with the order dated 14.8.2002 (Annexure 'V' hereto) and forthwith release appropriate amount of salary in the account of the petitioner in view of the said order and grant all consequential benefits to the petitioner from 27.6.1996 till the entitled of the petitioner;

32(C) : Such other and further relief as are deemed fit, in the facts and circumstances of this case may kindly be granted."

3. The grievance of the present petitioner is that order dated 14th August 2002 Annexure 'B', the respondent authority has not released appropriate amount of salary in the account of petitioner in view of the said order and not granted any consequential benefits to the petitioner.

4. Learned advocate Mr. Jani submitted that order dated 14th August 2002, now, it is not permissible to respondent to set aside such order after a period of four years. He submitted that this order is passed by Commissioner of Higher Education, therefore, he should have to file affidavit in respect of averments made in the petition by petitioner. He submitted that Joint Director has not been authorized to file

affidavit-in-reply against the present petition. He also submitted that there is no justification is given by respondent to contemplate the cancellation of the order dated 14th August 2002 in respect to petitioner only. Except aforesaid submissions, no other submissions are made by learned advocate Mr. Jani.

5. I have considered the submissions made by learned advocate Mr. Jani. The order dated 14th August 2002 which is at Page 39 wherein certain benefits are required to be given to the petitioner on the basis of information supplied by college authority. This order has been passed or issued by Joint Director of Higher Education and not issued by Commissioner of Higher Education. So, factually, the submissions made by learned advocate Mr. Jani is not correct. The important fact is that though order is in favour of the petitioner, according to him, is issued by the concerned authority in the year 2002 which is not implemented by the respondents in favour of the petitioner. Therefore, petition is filed after a period of three years claiming the benefit under order dated 14th August 2002. Meanwhile, except one reply dated 18th September 2003 addressed to the Accounts Officer through the Principal wherein certain details have been given in respect to petitioner by the Principal but so far in respect to the present petitioner is concerned, no application is filed / representation has been made to the respondent authority that why order dated 14th August 2002 is not implemented so far in favour of petitioner. Straightway, petition before approaching to the respondent authority is not maintainable and Court cannot entertain such petition. The Apex Court has considered that writ of mandamus cannot be issued straightway unless and until the petitioner first approached to the respondent authority about his grievance. The same view is taken by the Apex Court in the following reported judgments which are quoted as under :

(i) AIR 1975 SC 460 - Para 24 in case of Saraswati Industrial Syndicate Ltd. Etc., v. Union of India.

"24. As the appeals fail on merits we need not discuss the technical difficulty which an application for a writ of certiorari would encounter when no quasi-judicial proceeding was before the High Court. The powers of the High Court under Article 226 are not strictly confined to the limits to which proceedings for prerogative writs are subject in English practice. Nevertheless, the well-recognised rule that no writ or order in the nature of a Mandamus would issue when there is no failure to perform a mandatory duty applies in this country as well. Even in cases of alleged breaches of mandatory duties, the salutary general rule, which is subject to certain exceptions, applied by us, as it is in England, when a writ of Mandamus is asked for, could be stated as we find it set out in Halsbury's Laws of England (3rd edition, Vol. 13, p. 106):

"As a general rule the order will not be granted unless the party complained of has known what it was he was required to do, so that he had the means of considering whether or not he should comply and it must be shown by evidence that there was a distinct demand of that which the party seeking the: mandamus desires to enforce, and that demand was met by a refusal."

(ii) AIR 1975 SC 538 - Para 25 in case of Amrit Lal Berry v. Collector of Central Excise Central Revenue and others.

"25. In the petition of K. N. Kapur and others, we do not even find an assertion that any representation was made against any violation of a petitioner's right. Hence, the rule recognised by this Court in Kamini Kumar Das v. State of West Bengal, AIR 1972 SC 2060 at p. 2065 that a demand for justice and its refusal must precede the filing of a petition asking for direction or Writ of Mandamus, would also operate against the petitioners."

(iii) AIR 1976 SC 1654 - Para 42(3) in case of State of Haryana and another v. Chanan

Mal etc.,

"42. We proceed to record our conclusions as follows:

1. xxx

2. xxx

3. Any petitioner who applies for a writ or order in the nature of a Mandamus should, in compliance with a well known rule of practice, ordinarily, first call upon the authority concerned to discharge its legal obligation and show that it has refused or neglected to carry it out within a reasonable time before applying to a Court for such an order even where the alleged obligation is established."

(iv) 2006 (Lab. I.C.) 2081 - Para 19 (Rajasthan High Court - Division Bench) in case of Balwant Singh Parihar & Anr. v. Union of India & Ors.

"19. From the record of the writ petition, it appears that the petitioners have neither given any representation to the Pay Commission nor to the Union of India nor Railway Administration nor given any notice for demand of justice and straightway filed the writ petition for seeking mandamus in the matter of pay parity contrary to the well established principle of law that giving notice for demand of justice is sine qua non for seeking writ of mandamus. The writ petition deserves to be dismissed on this ground alone as there was no occasion for the respondents to consider the grievance of the petitioner's claim of parity in pay scale and also consider the objection of the respondents in reply of interference by the High Court under Article 226 of the Constitution of India in such matters. In the judgments cited by the counsel for the petitioners, it is nowhere laid down that the Court should evaluate the job for the purpose of grant of equal pay for equal work. On the contrary, in some of the judgments of the Supreme Court cited on behalf of the petitioners also and in the

other judgments, it has been repeatedly held by the Supreme Court that it is not for the Court to make job evaluation for the purpose of considering the equation of post and parity in pay scale and it is for the Pay Commission, the expert body and the Government to consider and decide. Thus, it would not be proper for this Court to make an enquiry in the matter of equation of post as well as grant of equal pay scale in absence of any representation to the respondents or pay Commission and findings thereon. Therefore, we may observe that it is open for the petition to make a representation to the respondents/Pay Commission as and when it is constituted in the matter of parity in pay scale and it is further expected from the respondents / Pay Commission to consider the same and pass the appropriate order."

6. Therefore, according to my opinion, straightway direct petition after a period of three years without approaching to the respondent authority by the petitioner about the grievance raised in the petition cannot be entertained by this Court without approaching to the respondent authority.

7. There is a delay of three years period is not explained by the petitioner that why this petition is filed for implementation of the order dated 14th August 2002 in the year 2005. Therefore, it is also not entertained by this Court. This aspect has been examined in following decisions which are quoted as under :

(i) 2006 II L.L.J. 421 (Para 6 to 10) in case of Karnataka Power Corporation Ltd., and Another v. K. Thangappan and Another.

"6. Delay or laches is one of the factors which is to be borne in mind by the High Court when they exercise their discretionary powers under Article 226 of the Constitution. In an appropriate case the High Court may refuse to invoke its extraordinary powers if

there is such negligence or omission on the part of the applicant to assert his right as taken in conjunction with the lapse of time and other circumstances, causes prejudice to the opposite party. Even where fundamental right is involved the matter is still within the discretion of the Court as pointed out in *Durga Prasad v. Chief Controller of Imports and Exports* AIR 1970 SC 769 : 1969(1) SCC 185. Of course, the discretion has to be exercised judicially and reasonably.

7. What was stated in this regard by SIR BARNES PEACOCK in *Lindsay Petroleum Company v. Prosper Armstrong Hurd etc.* 1874(5) PC 221 was approved by this Court in *Moon Mills Ltd. v. Industrial Courts* AIR 1967 SC 1450 : 1967-II-LLJ-34 and *Maharashtra State Road Transport Corporation v. Balwant Regular Motor Service* AIR 1969 SC 329 SIR BARNES had stated :

“ Now, the doctrine of laches in Courts of Equity is not an arbitrary or technical doctrine. Where it would be practically unjust to give a remedy either because the party has , by his conduct done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has through perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were after wards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitation, the validity that defence must be tried upon principles substantially equitable. Two circumstances always important in such cases are, the length of the delay and the nature of the acts done during the interval which might

affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy."

8. It would be appropriate to note certain decisions of this Court in which this aspect has been dealt with in relation with Article 32 of the Constitution. It is apparent that what has been stated as regards that Article would apply, *a fortiori*, to Article 226. It was observed in *R.N. Bose v. Union of India* AIR 1970 SC 470 to the petitioner who without any reasonable explanation approaches this Court under Article 32 after inordinate delay. It was stated that though Article 32 is itself a guaranteed right, it does not follow from this that it was the intention of the Constitution makers that this Court should disregard all principles and grant relief in petitions filed after inordinate delay.

9. It was stated in *State of M.P. v. Nandlal Jaiswal* AIR 1987 SC 251 : 1986(4) SCC 566 that the High Court in exercise of its discretion does not ordinarily assist the tardy and the indolent or the acquiescent and the lethargic. If there is inordinate delay in the part of the petitioner and such delay is not satisfactorily explained, the High Court may decline to intervene and grant relief in exercise of its writ jurisdiction. It was stated that this rule is premised on a number of factors. The High Court does not ordinarily permit a belated resort to the extraordinary remedy because it is likely to cause confusion and public inconvenience and bring, in its train new injustices, and if writ jurisdiction is exercised after unreasonable delay, it may have the effect of inflicting not only hardship and inconvenience but also injustice on third parties. It was pointed out that when writ jurisdiction is invoked, unexplained delay coupled with the creation of third party

rights in the meantime is an important factor which also weighs with the High Court in deciding whether or not to exercise such jurisdiction.

10. It has been pointed out by this Court in a number of cases that representations would not be adequate explanation to take care of delay. This was first stated in *K.V. Raja Laxshmiah v. State of Mysore* AIR 1967 SC 993 : 1967-II-LLJ-434. This was reiterated in *R.N. Bose's case* (supra) by stating that there is a limit to the time which can be considered reasonable for making representations and if the Government had turned down one representation on similar lines will not explain the delay. In *State of Orissa v. P. Samantaraj* AIR 1976 SC 2617 : 1977(3) SCC 396 making of repeated representations was not regarded as satisfactory explanation of the delay. In that case the petition had been dismissed for delay alone. (See : *State of Orissa v. Arun Kumar* AIR 1976 SC 1639 : 1976(3) SCC 579 also)."

(ii) 2006 II C.L.R. 535 - Para.6 in case of **Gujarat Water Resources Development Corporation Ltd. Vs. Baldevji Mohanji Solanki**. The relevant observations made in Para 6 are as under:

"6. The law on the question raised in the present petitions, has been examined by the Apex Court as well as various High Courts. That has been discussed as under:

6.1 In case of Bishnu Charan Mohantray Vs. State of Orrisa, reported in AIR 1973 Orissa 1999, the following general principles relating to delay and laches has been laid down:

(i) The Limitation Act has no application to writ petitions. Where, however, a suit for identical relief would be barred by the law

of limitation, the court would ordinarily refuse to exercise discretion to grant relief under Article 226.

(ii) Even if a suit for the same relief is not barred by limitation under the Limitation Act, yet the High Court may refuse to issue a writ, if otherwise the delay is not explainable by satisfactory reasons.

(iii) Two important circumstances to be borne in mind in all such cases are : the length of the delay and the nature of the acts done during the interval which might affect either party and cause a balance of justice or injustice in taking the one course or the other so far as relates to the remedy.

(iv) Where by the conduct of the party, the delay might fairly be regarded as equivalent to a waiver of the remedy, the relief under Article 226 would be refused.

(v) Even if the conduct or act is not equivalent to a waiver, if the neglect of the petitioner put to opposite party in a situation in which it would not be reasonable to place him if the remedy is afterwards granted, the relief under Article 226 should be refused on account of delay and laches.

(vi) Utmost expedition is the essence for a claim under article 226; and

(vii) no hard and fast rule can be laid down. Each case is to be determined on its own facts and circumstances.

6.2 The further view has laid down by the Supreme Court in case of P.S.Sadasivaswamy Vs. State of Tamil Nadu, reported in (1975) 1 SCC 152. Relevant observations of the said decision is quoted as under :

“It is not that there is any period of limitation for the courts to exercise their powers under Article 226 nor is it that there can never be a case where the courts cannot interfere in a matter after the passage of a

certain length of time. But it would be a sound and wise exercise of discretion for the courts to refuse to exercise their extraordinary powers under Article 226 in the case of persons who do not approach it expeditiously for relief and who stand by and allow things to happen and then approach the court to put forward stale claims and try to unsettle settled matters," (emphasis supplied).

6.3 In the case of Eastern Coal Fields Ltd. Vs. Central Government Industrial Tribunal, reported in 2000 III LLJ 3, the Calcutta High has held in Para, 6, 7 and 8 as under :

"6. Having heard the learned counsel for the parties we are of the opinion that it is not a fit case where this Court should interfere with the impugned judgment and order as apart from the fact that the learned trial Judge has refused to exercise its power of judicial review it had also recorded a finding as regards the question of delay in the following terms :

"Before parting with this case it should be noted that though the learned Tribunal passed the award as far back as March 28, 1984 th writ application was not filed before February 8, 1990 on the plea that delay was due to the fact that Government permission could not be obtained before February 7, 1989. The explanation is not satisfactory. The plea of delay on the ground of office formalities is absolutely untenable especially in case of Industrial Disputes where there was illegal termination of service about 20 years ago. It was submitted on behalf of the respondent union that this long delay on the part of the management of all the workmen not only the wasting of their valuable years of lives but have also caused death to some of them. It is true, that there is no limitation in filing the writ application but that shall not automatically entitle the petitioner to make limitless delay in filing the writ application, especially, in case of the present nature,

where such delay brought untold miseries to the workmen. There being unreasonable delay in filing the application on frivolous ground the writ Court would have refused to grant any relief to the petitioner, even if it had been otherwise entitled to it. Th writ petition is liable to be rejected on the ground of delay also"

7. Mr.Ginwala submits that delay cannot be considered to be a ground for refusing to exercise its jurisdiction by the High Court in a case where the writ of prohibition is to be issued. The submission of the learned counsel cannot be accepted for more than one reasons. The appellant primarily has prayed for issuance of a writ of certiorari for quashing of the aforementioned award dated March 28, 1994 passed by the Industrial Tribunal. Prayer for issuance of a writ of prohibition had been sought for and the same could be issued only in the event the primary prayer of the appellant viz. A writ of certiorari would be issued. It is now a well settled principle of law that the delay defeats equity. It is further well settled that a person who sleeps over its right cannot claim any equity in enforcing its right before a writ Court.

8. Writ of certiorari as is well known is a discretionary remedy. A writ Court does not exercise its jurisdiction under Article 226 of the Constitution of India merely because it is lawful to do so. While exercising its Jurisdiction under Article 226 a writ Court may take into account several factors, delay being one of them. As noticed by the learned trial Judge the concerned workmen were refused employment as far back as in the year 1975 and reference was made by the Central Government only on August 1, 1978. The learned Tribunal below made its awards on March 28, 1984. The writ application had been filed only on February 8, 1990. The only explanation which the appellant gave before the learned Trial Judge was that it was required to obtain permission of the Central Government for filing a writ

application which could not be obtained before February 7, 1989. the said explanation, having been offered without any particulars, did not find favour with the learned trial Judge. He, therefore, refused to exercise its discretion."

6.4 In case of M.C.D. Vs. Rajkumar & Othrs, reported in 2004 Lab IC 2334, the Delhi High Court has held in Para 3 and 4 as under :

"3. This writ petition challenges the Award dated 10th July,2000. Learned counsel for the petitioner submits that the award was published on 4th January,2001 and the information relating thereto was received in the office of the petitioner Corporation on 14th February,2001. However, the writ petition was filed in this Court only on 18th February,2002. There is no other explanation for the delay and laches in filing the writ petition. Mr.Monga has submitted that in matters relating to the movement of files in Government Department, files move at their own pace and such delay in the movement of the official files occur because they are required to go through several channels. Consequently the delay in filing the writ petition is not such which should dis-entitle the petitioner to approach this Court under Article 226 of the Constitution.

4. In my view, institutionalized lethargy cannot be any ground to explain the laches of more than one year. Merely because the bureaucratic machinery in MCD moves slowly cannot be a ground for condoning laches."

6.5 In case of Bhoop Singh Vs. Union of India, reported in AIR 1992 SC 1414, the Apex Court has held in Para.8 as under :

"8. There is another aspect of the matter. Inordinate and unexplained delay or laches is by itself a ground to refuse relief to the petitioner, irrespective of the merit of his claim. If a person entitled to a

relief chooses to remain silent for long, he thereby gives rise to a reasonable belief in the mind of others that he is not interested in claiming that relief. Others are then justified in acting on that behalf. This is more so in service matters where vacancies are required to be filled promptly. A person cannot be permitted to challenge the termination of his service after a period of twenty-two years, without any cogent explanation for the inordinate delay, merely because others similarly dismissed had been reinstated as a result of their earlier petitions being allowed. Accepting the petitioner's contention would upset the entire service jurisprudence and we are unable to construe Dharampal in the manner suggested by the petitioner. Art. 14 or the principle of non-discrimination is an equitable principle and, therefore, any relief claimed on that basis must itself be founded on equity and not be alien to that concept. In our opinion, grant of the relief to the petitioner, in the present case, would be inequitable instead of its refusal being discriminatory as asserted by learned counsel for the petitioner. We are further of the view that these circumstances also justify refusal of the relief claimed under Art. 136 of the Constitution."

6.6 In case of State of M.P. & Others Vs. Nandlal Jaiswal and Others, reported in AIR 1987 SC 251, the Apex Court has held in Para.23 as under :

"23. Now, it is well settled that the power of the High Court to issue an appropriate writ under Article 226 of the Constitution is discretionary and the High Court in the exercise of its discretion does not ordinarily assist the tardy and the indolent or the acquiescent and the lethargic. If there is inordinate delay on the part of the petitioner in filing a writ petition and such delay is not satisfactorily explained, the High Court may decline to intervene and grant relief in the exercise of its writ jurisdiction. The evolution of this

rule of laches or delay is premised upon a number of factors. The High Court does not ordinarily permit a belated resort to the extraordinary remedy under the writ jurisdiction because it is likely to cause confusion and public inconvenience and bring in its train new injustices. The rights of third parties may intervene and if the writ jurisdiction is exercised on a writ petition filed after unreasonable delay, it may have the effect of inflicting not only hardship and inconvenience but also injustice on third parties. When the writ jurisdiction of the High Court is invoked, unexplained delay coupled with the creation of third party rights in the meanwhile is an important factor which always weighs with the High Court in deciding whether or not to exercise such jurisdiction. We do not think it necessary to burden this judgment with reference to various decisions of this Court where it has been emphasised time and again that where there is inordinate and unexplained delay and third party rights are created in the intervening period, the High Court would decline to interfere, even if the State action complained of is unconstitutional or illegal. We may only mention in the passing two decisions of this Court one in *Ramanna Dayaram Shetty v. International Airport Authority of India*, (1979) 3 SCR 1014: (AIR 1979 SC 1628) and the other in *Ashok Kumar v. Collector, Raipur*, (1980) 1 SCR 491 : (AIR 1980 SC 112). We may point out that in *R. D. Shetty's case* (supra), even though the State action was held to be unconstitutional as being violative of Article 14 of the Constitution, this Court refused to grant relief to the petitioner on the ground that the writ petition had been filed by the petitioner more than five months after the acceptance of the tender of the fourth respondent and during that period, the fourth respondent had incurred considerable expenditure, aggregating to about Rs. 1.25 lakhs, in making arrangements for putting up the restaurant and the snack bar. Of course, this rule of laches or delay is not a rigid rule

which can be cast in a straitjacket formula, for there may be cases where despite delay and creation of third party rights the High Court may still in the exercise of its discretion interfere and grant relief to the petitioner. But such cases where the demand of justice is so compelling that the High Court would be inclined to interfere in spite of delay or creation of third party rights would by their very nature be few and far between. Ultimately it would be a matter within the discretion of the Court; ex hypothesi every discretion must be exercised fairly and justly so as to promote justice and not to defeat it."

6.7 In case of Delhi Transport Corporation Vs. Jai Bhagwan, reported in 2003-I LLJ 1029, the Delhi High Court has held in Para.4 and 5 as under:

"4. My attention has been drawn by Ms.Bajaj to the judgment of the Constitution Bench in State of Madhya Pradesh Vs. Bhailal, AIR 1964 SC 1006. The Apex Court observed that :

"It is not easy nor is it desirable to lay down any rule for universal application. It may, however, be stated as a general rule that if there has been unreasonable delay, the Court ought not to ordinarily lend its aid to a party by this extraordinary remedy of mandamus.... It appears to us, however, that the maximum period fixed by the Legislature as the time within which the relief by a suit in a civil court must be brought may ordinarily be taken to be a reasonable standard by which delay in seeking remedy under Article 226 of the Constitution of India can be measured. This Court may consider the delay unreasonable, even if it is less than the period of limitation prescribed for a civil action for the remedy but where the delay is more than this period, it will almost always be proper for the Court to hold that it is unreasonable".

It will be relevant to bear in mind that

the Constitution Bench was concerned with a situation where the petitioner has voiced the grievance that he had been assessed to tax under a void statute. Even in those extraordinary circumstances, the Supreme Court has declined to over look the laches. Ms. Kittoo Bajaj also relies on the decision of the Supreme Court in Maharashtra Road State Corporation Vs. Balvant Regular Motor Service, Amravati, AIR 1969 SC 329. In that case, the Apex Court again articulated that;

"It is well established that the writ of certiorari will not be granted in a case where there is such negligence or omission on the part of the applicant to assert his right as, taken in conjunction with the lapse of time and other circumstances, causes prejudice to the adverse party."

The Court relied on Lindsey Petroleum Company Vs. Prosper Armstrong Hurd, Arbran Farewell and John Kemp (1874) 5 PC 221 and also specifically noticed in its earlier decision in Moon Mills Ltd. Vs. M.R.Neher, President, Industrial Court, Bombay, AIR 1967 SC 1450 : 1967 -II LLJ 34, Ms.Kittoo Bajaj relies on the observations of the Apex Court in Naik Subedar Lachhman Dass Vs. Union of India, AIR 1977 SC 1979, there the Court found that the writ petition has been filed after gross delay for which there was no specific explanation and, therefore, endorsed the High Court's decision for a summary dismissal of the action. It may be observed that the laches have not even been attempted to be answered or explained by the DTC.

5. On the issue of delay and laches, Mr.Vibhu Shankar, learned Counsel for the petitioners, has relied heavily on Para.6 of the judgment in Moon Mills Ltd. Vs. M.R.Meher, President, Industrial Court, Bombay (Supra) which reads as under at p.38 of 1967-II - LLJ 34.

"On behalf of the respondents Mr. B. Sen, however, pointed out that the conduct of the appellant does not entitle it to the

grant of a writ, because it has been guilty of acquiescence or delay. It was pointed out that the award of Mr. Bhatt was given on April 25, 1958 but an application to the High Court for grant of a writ was made long after on November 16, 1959. We do not think there is any substance in this argument, because the second respondents had made an application, dated August 19, 1958 to the Labour Court for enforcement of the award and the appellant had contested that application by a Written Statement, dated September 15, 1958. The Labour Court allowed the application on August 4, 1959 and the appellant had preferred an appeal to the Industrial Court on August 31, 1959. The decision of the Industrial Court was given on October 24, 1959 and after the appeal was dismissed the appellant moved the High Court for grant of a writ on November 16, 1959. Mr. B. Sen then put forward the argument that the appellant itself had acted on the bonus agreement and on October 14, 1957 had issued a notice informing its workers that "pursuant to the award of the Industrial Court in terms of the agreement, dated March 1, 1956 reached between the Mill Owners' Association, Bombay, and the Rashtriya Mill Mazdoor Sangh, regarding payment of bonus would be paid to them at 4.8 per cent of the total basic earning during 1956". On October 27, 1956 the appellant and the Secretary of the second respondents signed a joint statement in which it was stated as follows :

'Since it has not yet been possible to complete bonus calculations for all these years, it is hereby agreed between the Rashtriya Mill Mazdoor Sangh, Bombay, and the Moon Mills Ltd, Bombay, that under the Bonus Agreement the Moon Mills should pay a bonus at the rate of 4.8 per cent for each of the years 1953, 1954 and 1955 as a tentative payment.'

It was, therefore, contended that the appellant itself had agreed with the second respondents to pay bonus for 1953, 1954, 1955 and 1956 according to the terms of the bonus

agreement. It was also pointed out that the appellant had not pressed its objection with regard to jurisdiction before the Labour Court or the Industrial Court. But it appears that the decision of this Court in Prakash Cotton Mills case, (1962) 2 SCR 105: (AIR 1961 SC 977), was given on February 16, 1961 after the decision of K. K. Desai, J. on July 1, 1960 and before the decision of the Letters Patent Bench on February 6, 1962. In the circumstances of this case, we do not consider that there is such acquiescence on the part of the appellant as to disentitle it to a grant of a writ under Art. 226 of the Constitution. It is true that the issue of a writ of certiorari is largely a matter of sound discretion. It is also true that the writ will not be granted if there is such negligence or omission on the part of the applicant to assert his right as, taken in conjunction with the lapse of time and other circumstances, causes prejudice to the adverse party. The principle is to a great extent, though not identical with, similar to the exercise of discretion in the Court of Chancery. The principle has been clearly stated by Sir Barnes Peacock in Lindsay Petroleum Co. v. Prosper Armstrong Hurd, Abram Farewell, and John Kemp, (1874) 5 PC 221 at p. 239, as follows:-

"Now the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence

must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as related to the remedy.'

In the present case, we are of opinion that there is no such negligence or laches or acquiescence on the part of the appellant as may disentitle it to the grant of a writ."

8. In light of the affidavit-in-reply filed by the Joint Director from the office of respondent No.2 by one Shri S.G. Desai, the relevant Para 6 to 10 are quoted as under which gives specific details about the merits of the matter that how the college authority has mislead to respondent No.2 and obtained the orders in favour of the petitioner dated 14th August 2002. Therefore, a specific averments have been made by respondent No.2 in affidavit-in-reply that respondent No.2 has contemplated to cancel the order dated 14th August 2002 only in respect to petitioner but because of the pendency of petition, they are not passing any order in respect to order passed on 14th August 2002, therefore, according to my opinion, looking to the averments made in the present affidavit-in-reply even on merits, petitioner has no case.

"6. It is submitted that the answering respondent would be able to substantiate that the order dated 14-08-2002 is obtained from the Commissioner of Higher Education by misrepresenting the authorities and the college authorities have misled the respondent No.2 authority which has resulted in passing of the said order dated 14-08-2002 as far as the present petitioner is concerned. Therefore, the respondent No.2 authorities is contemplating to cancel the said order dated 14-08-2002 as far as the present petitioner is concerned. However, in view of the pendency of the present petition, the said action is not undertaken.

7. It is submitted that the facts leading to the present case are that the petitioner was appointed as part time lecturer in the respondent No.4 College on 30-01-1989. It is submitted that thereafter the said appointment was approved by the office of the respondent No.2. However, since the class of T.Y., B.Com., was closed down due to reduction of standards, vide order dated 31.08.1995 (Annexure K Page 23 to the petition), the services of the petitioner came to be terminated.

8. It is submitted that thereafter the T.Y., B.Com., class was again re-opened and the petitioner submitted representation to the college authorities to reappoint the petitioner as lecturer. It is submitted that pursuant to the representation of the petitioner, the college authorities vide order dated 16-06-1996 (Annexure L Page 27 to the petition), re-appointed the petitioner. However, the said appointment was subject to approval of the University and the State Government. However, no approval was obtained from the State Government and even before appointing the petitioner, no regular selection procedure was undertaken by the College Management.

9. It is submitted that in spite of the above fact that the appointment of the petitioner was not approved at any stage, the respondent No.4 college in an application for payment of period allowance to the lecturer, had mentioned that the total services of the petitioner was 12 years and 3 months, out of which a period of 8 months and 26 days was considered to be leave without pay. Therefore, it was indirectly represented to the respondent No.2 authority that the petitioner had been in continuous employment of the respondent No.4 college from 1989-90. However, the fact that the petitioner was re-appointed in the year 1996 was suppressed. On

the contrary, a certificate to the effect was issued on 13.02.2002 that the period of 8 months and 26 days was considered as leave without pay. A copy of prescribed form along with certificate dated 13.02.2002 is annexed herewith and marked as Annexure R-1.

10. Therefore, the respondent authorities were misled by the respondent No.4 College and was made to understand that the petitioner's services were continuous. However, it was not stated that the appointment after 1996 was a fresh appointment and earlier, the petitioner's services were terminated vide order dated 31.08.1995. Therefore, in view of the above referred misleading information from the respondent No.4 college, the respondent No.2 authority had passed the order dated 14.08.2002 stating that the total services of the petitioner was 11 years, which was on the basis of misleading information submitted by the respondent No.4 college."

9. There is no rejoinder filed by the petitioner and respondent No.4 - College Authority has filed affidavit-in-reply which has been considered by this Court. I have considered the affidavit-in-reply. On merits, petitioner's case is made out that petitioner is entitled the benefit of order dated 14th August 2002 by respondent No.4 in their reply. According to respondent No.2, this order dated 14th August 2002 has been issued on misrepresentation by the college authority. Therefore, they want to correct or rectify it. It is settled law that if any order obtained on the basis of misrepresenting the authority is entitled to rectify or correct the mistake, for that, at the most, petitioner can be entitled the opportunity of hearing, except that, no right with the petitioner who can prevent respondent No.2 for passing the fresh order after getting the correct information from the college authority. It is not necessary that person who has been joined as a party or who has been issued the order must have to file affidavit, it is open to the Court to consider or it is open for the Court to satisfy the affidavit of subordinate authority. The

petitioner has no right to ask the Court that authority who has issued order must have to file affidavit. For that, petitioner has no right to challenge the averments made in affidavit-in-reply only on that ground. The affidavit-in-reply filed by Joint Director who has issued the order. This contention is not raised by the petitioner filing rejoinder against the reply of respondent No.2.

10. The respondent No.3 - Kheralu College has filed affidavit-in-reply by one Shri Ranchhodbhai Chaudhri, Principal of Kheralu College about the allegations of misrepresentations by the College and giving factual details in respect to petitioner. It is for the respondent No.2 to consider such details, this Court cannot examine or made inquiry or evaluated the disputed question of facts between the parties as to whether petitioner is entitled the benefit of order dated 14th August 2002 or not ? When affidavit in reply of respondent No.2 in Para 6, it is made clear that college authority has misrepresented to respondent No.2 in respect to the claim of petitioner, therefore, this Court cannot examine the question as to whether any misrepresentation is made or not? But it can only be examined by respondent No.2 and then to pass appropriate orders whether petitioner is entitled the benefit as claimed in the petition or not. Therefore, this Court cannot examine the disputed question of facts while exercising the power under Article 226 of the Constitution of India. It is also necessary to consider that no rejoinder is filed by the petitioner against the affidavit-in-reply filed by respondent No.2. It is also necessary to not that no one is appeared on behalf of respondent No.4 before this Court and no such submissions were made by respondent No.4 before this Court.

11. Therefore, according to my opinion, there is no substance in the present petition as well as petition is not entertained by this Court as reasons aforesaid mentioned. Accordingly, there is no substances in the present petition, present petition is dismissed.

[H.K. RATHOD, J.]

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